IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ANTHONY CALDERA,
Appellant.

No. 2 CA-CR 2018-0104
Filed November 28, 2018

Appeal from the Superior Court in Pinal County
No. S1100CR201702149
The Honorable Kevin D. White, Judge

AFFIRMED AS CORRECTED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 After a jury trial, Anthony Caldera was convicted of seven counts of sexual conduct with a minor under the age of twelve, seven counts of sexual exploitation of a minor under the age of fifteen, and two counts of aggravated assault of a minor. The trial court sentenced him to consecutive life terms for each count of sexual conduct, to be followed by consecutive, seventeen-year prison terms for the sexual exploitation counts and one-year prison terms for the aggravated assault counts. On appeal, he argues that the indictment was multiplicitous as to three counts of sexual exploitation of a minor and that his consecutive sentences for those offenses violate A.R.S. § 13-116 because the convictions constitute a single act. He further asks that we correct his sentence with regard to one count of aggravated assault. We affirm his convictions and his sentences as corrected.

¶2 Caldera's convictions stem from his repeated sexual contact with his two stepdaughters, some of which he video-recorded. Three videos found on his cell phone, forming the basis for the three counts of sexual exploitation of a minor at issue here, were recorded within a few minutes of each other. On appeal, Caldera argues the three videos "are all part of one video" and, thus, the indictment was multiplicitous. Caldera asserts that, as a result, his convictions and sentences for two of those counts should be vacated.

¶3 An indictment is multiplicitous when it charges a single offense in multiple counts.[1] *State v. Brown*, 217 Ariz. 617, ¶ 7 (App. 2008).

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[1]Caldera did not object to the indictment or raise a double jeopardy claim below. Thus, he has forfeited review for all but fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶ 1 (2018). A double jeopardy violation, however, would constitute fundamental error. *State v. Price*, 218 Ariz. 311, ¶ 4 (App. 2008). We therefore address the merits of his arguments.

"In determining multiplicity the court must consider whether each count of the indictment requires proof of a fact that the other counts do not." *State v. Barber*, 133 Ariz. 572, 576 (App. 1982). In the three counts at issue here, Caldera was charged pursuant to A.R.S. § 13-3553(A)(1) with committing sexual exploitation by "knowingly recording any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct," with each count listing a separate video recording. Because each charge required proof of a separate fact—the specified video forming the basis for that count—there was nothing multiplicitous in the indictment charging Caldera with three counts of sexual exploitation of a minor.

¶4 Caldera argues, however, there originally had been one video, and he had inadvertently created three videos by attempting to delete the original video. Although he does not frame it as such, we understand this argument to be that his convictions violate double jeopardy. *See Brown*, 217 Ariz. 617, ¶ 13 ("[W]hen a defendant is convicted more than once for the same offense, his double jeopardy rights are violated . . . .) (emphasis omitted). But, although there was evidence the videos found on Caldera's phone could be fragments of longer videos, the evidence does not support the conclusion that he recorded only one; there was no testimony that attempts to delete a video would (or even could) result in multiple video fragments. The jury readily could conclude he had created separate recordings. Thus, because "the evidence supports the commission of each of the separate charges, they are not multiplicitous and no error was committed," and Caldera's double-jeopardy claim fails. *State v. Bruni*, 129 Ariz. 312, 320 (App. 1981).

¶5 Caldera also argues his consecutive sentences for the three counts of sexual exploitation violate § 13-116. Section 13-116 states: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." For the same reasons we have rejected Caldera's double-jeopardy argument, this claim also fails. He was not punished for the same act "in different ways by different sections of the laws." *Id.* He was instead punished for three distinct violations of the same statute.

¶6 Caldera also asks that we correct a clerical error regarding the sentence for one of his two convictions of aggravated assault. At sentencing, the trial court imposed a one-year prison term for count six, aggravated assault. However, the court also referred to one of the counts of sexual exploitation of a minor as "Count 6" and imposed a seventeen-

year prison term for that count—without imposing a sentence for count thirteen, also sexual exploitation of a minor. The court later corrected the "inadvertent omission" of count thirteen, amending the minute entry to reflect a seventeen-year prison term for that count.[2] It did not, however, correct the sentencing minute entry to reflect a single, one-year prison term for count six. When the trial court's intent is clear, as it is here, we have authority to correct a sentence to reflect that intent. *State v. Vandever*, 211 Ariz. 206, ¶ 16 (App. 2005) (appellate court authorized to correct inadvertent error in sentencing minute entry); *State v. Lopez*, 230 Ariz. 15, n.2 (App. 2012) ("When we can ascertain the trial court's intent from the record, we need not remand for clarification."). Thus, we correct the sentencing minute entry to impose a one-year prison term for count six, aggravated assault of a minor, not a seventeen-year term for sexual exploitation of a minor.

¶7 We affirm Caldera's convictions and his sentences as corrected.

[2]Caldera does not assert the trial court erred by imposing a prison term for count thirteen without him being present. A defendant has a right to be present at sentencing. Ariz. R. Crim. P. 26.9. However, presence error "may be subject to harmless error review," *State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 16 (1998), and the court's corrective order did not prejudice Caldera, given that it imposed the same sentence it had for his other five convictions of sexual exploitation of a minor.